RECORD AND BRIEF

No. 17-494

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SOUTH DAKOTA,
Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, US CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL AASA: THE SCHOOL SUPERINTENDENTS ASSOCIATION, AND NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS SUPPORTING PETTTIONER

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BRIEF OF AMICI CURIAE

Amici curiae respectfully submit this brief in support of Petitioner, the State of South Dakota, urging that the Court grant review in No. 17-494.

INTEREST OF AMICI

The present amici are organizations representing state and local elected and appointed officials from throughout the United States, up to and including state governors.[1] These organizations regularly file amicus briefs in cases, like this one, raising issues of concern to their members. Additional information on each of the amici is available in the attached appendix.

Amici maintain a vital interest in the rules governing the assessment and collection of sales tax by state and local governments. These revenues fund essential benefits and services provided to the citizens amici represent. Accordingly, amici's previous brief to this Court in *Direct Marketing Association* v. *Brohl* laid out the research regarding the harms caused by *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992).

Amici strongly believe that this Court needs to reconsider *Quill* in order to prevent further harm to state revenues. In 2016, in its petition supporting denial of certiorari in *Direct Marketing Association* v. *Brohl II* amici advised the Court that, in response to

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and were timely notified.

Justice Kennedy's invitation, an appropriate vehicle would be arriving to the Court soon. They write to inform the Court that South Dakota's legislation is the ideal vehicle to reach this important issue and, therefore, urge the Court to grant this petition.

SUMMARY OF ARGUMENT

States and local governments lost an estimated $26 billion in 2015 from uncollected sales and use taxes from out-of-state sellers for one reason: the Supreme Court's decisions in *Quill* and *Bellas Hess* do not allow States to require out-of-state merchants to collect and remit these taxes on sales to consumers within the State unless the out-of-state merchant has a physical presence within the State. The effect of these decisions in today's digital economy, where online sales are a mere click away, is devastating for States and local governments, who depend on these revenues. The decisions also create an unfair disadvantage for traditional brick-and-mortar retailers—businesses that create jobs within the states and localities—which must add five to ten percent to their prices to account for these taxes.

Confronted with the obstacles erected by *Quill*, States have enacted various legislative fixes to attempt to collect the billions of dollars of sales and use taxes owed to them by out-of-state merchants. In 2016, the South Dakota Legislature enacted, and the Governor signed, Senate Bill 106, requiring out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either (1) $100,000 worth of business, or (2) 200 separate transactions. S.D. Codified Laws §§ 10-64-1 *et seq.* (2016).

The South Dakota legislation was designed as a direct response to Justice Kennedy's invitation in *Direct Marketing Association* v. *Brohl* to present "an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Shortly after the law was enacted, South Dakota sought a declaratory judgment in state circuit court to permit enforcement against three out-of-state retailers. After an unsuccessful removal to federal court, the case quickly worked its way through the state courts, with both the state circuit court and the Supreme Court of South Dakota concluding that this Court's precedents in *Quill* and *Bellas Hess* forbid South Dakota from enforcing the legislation against the out-of-state retailers.

South Dakota's carefully tailored legislation arrives before this Court in a clean procedural posture, primed to assist the Court in addressing a single question—whether *Quill* retains constitutional force in the modern digital economy.

ARGUMENT

I. *QUILL* HAS RESULTED IN A TIDAL WAVE OF LITIGATION AND CREATED A SEA OF UNCERTAINTY AMONG STATES AS TO HOW TO COLLECT TAXES IN TODAY'S DIGITAL AGE.

Quill stands as the single greatest obstacle to meaningful sales tax reform in today's digital economy. Decided before the massive expansion in online retail, *Quill* has caused States and local governments to lose billions in annual sales and tax revenue, "inflicting extreme harm and unfairness on the States." *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1134 (2015) (Kennedy, J., concurring).

In *Quill Corp.* v. *North Dakota*, this Court reaffirmed the prohibition on States levying a sales and use tax on sales by businesses that lack a physical presence within the state. 504 U.S. 298 (1992). The Court openly reconsidered the prohibition and ultimately chose to retain its rule—but did so only to protect the reliance interests that had grown up around the rule. Echoing its prior decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967), the Court held that physical presence was required to avoid a violation of the "negative" or "dormant" Commerce Clause's substantial nexus requirements. *Quill*, 504 U.S. at 312. However, the Court expressly acknowledged that *Bellas Hess* very well might have been decided differently under "contemporary Commerce Clause jurisprudence" and cases like *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

These holdings have spawned a host of litigation as States have grappled with how to counter the irrational tax advantage *Quill* erected for online retailers who avoid physical presence within any given state. These holdings have also led to countless cases over the last two decades in which State and federal courts have enforced various state taxes that look a lot like—and impose burdens quite similar to—state sales taxes, against out-of-state companies, regardless of *Quill*.[2]

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[2] *See, e.g.*, *Am. Target Advert., Inc.* v. *Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000), *cert. denied*, 531 U.S. 811 (2000); *KFC Corp.* v. *Iowa Dep't of Revenue*, 792 N.W.2d 308, 323 (Iowa 2010), *cert. denied*, 565 U.S. 817 (2011); *Capital One Bank* v. *Comm'r of Revenue*, 899 N.E.2d 76 (Mass. 2009), *cert. denied*, 557 U.S. 919 (2009); *Couchot* v. *State Lottery Comm'n*, 659 N.E.2d 1225 (Ohio

More specifically, States have resorted to a variety of "Amazon laws" and a hodgepodge of other legislation intended to recoup the massive losses incurred. As of today, over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their State. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota* v. *Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017).[3]

In 2008, New York initiated this trend by enacting its so called "Amazon tax," which Amazon.com and other online retailers challenged in *Overstock.com, Inc.* v. *N.Y. State Dep't of Taxation and Finance*. 987 N.E.2d 621, 622-23 (N.Y 2013), *cert. denied*, 134 S. Ct. 682 (2013); *see also* William L. Fletcher, Jr., Note, *Netflix and* Quill*: Using Access and Consumption to Create a Plan for Taxing the Cloud*, 58 Wm. & Mary L. Rev. 1029, 1046-47 (2017). The New York law was designed to establish the nexus of an out-of-state vendor through its use of in-state, click-through advertisements. *Overstock.com, Inc.*, 987 N.E.2d at 622-23. Online vendors were then required to collect and remit taxes on purchases by New York residents. *Id.* Referring to the vendor's "active in-state solicitation that produce[d] a significant amount of revenue," the New York state courts held that the

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1996), *cert. denied*, 519 U.S. 810 (1996); *Geoffrey, Inc.* v. *S.C. Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993); *Tax Comm'r of State* v. *MBNA Am. Bank, N.A.*, 640 S.E.2d 226, 232-34 (W.Va. 2006), *cert. denied sub nom. FIA Card Servs., NA.* v. *Tax Comm'r of West Virginia*, 551 U.S. 1141 (2007).

[3] Available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

online retailers failed to prove the statute unconstitutional under the Commerce Clause. *Id.*

After New York, the flood gates opened. By 2011, the following states introduced some type of "Amazon" legislation: Arkansas, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Mexico, North Carolina, Rhode Island, South Dakota, Tennessee, Texas, Vermont and Virginia. *See* Sylvia Dion, *Amazon Laws: The New Normal? Internet Sales Tax Law Update*, SalesTaxSupport.com (July 17, 2011).[4] As of today, over 40 states have proposed or enacted some form of legislation aimed at ameliorating the *Quill* damage in their State. *See* Joe Crosby, Liz Malm & Ryan Maness, *South Dakota* v. *Wayfair: Three Maps*, MultiState Insider (Oct. 4, 2017).[5]

In spite of the initial popularity of "Amazon" legislation, studies indicated that these laws failed to generate the anticipated sales tax revenues or to level the playing field between online retailers and brick-and-mortar stores because major online retailers, like Amazon.com, severed their affiliate contracts in States with an "Amazon" law and failed to register as sales tax collectors. *See* Lance Whitney, *Amazon Cuts*

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4 Available at http://www.salestaxsupport.com/blogs/issues/internet-tax-ecommerce/are-amazon-laws-the-new-normal-an-update-on-internet-sales-tax-laws/.

5 Available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

Affiliate Ties in More States Over Taxes, CNet (June 2011).[6]

Amid a modest recovery from the Great Recession, States continued to witness declining revenue collections. *Quill*, meanwhile, limited States' ability to collect revenue from the simultaneous boom in e-commerce. *See, e.g.*, Todd Haggerty, *"Weakcovery": State General Fund Revenues, Economic Downturns & Recoveries*, Nat'l Conference State Legislatures (Jan. 2013)[7]; Lucy Dadayan & Donald J. Boyd, *After Disastrous 2009, States Report Modest Revenue Growth in Early 2010*, The Nelson A. Rockefeller Institute of Government (July 2010).[8]

As a result, legislatures began considering a range of other tools including, but not limited to, notification and reporting requirements, economic nexus laws, and affiliate nexus laws.[9] In 2017 alone, at least 30

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6 Available at https://www.cnet.com/news/amazon-cuts-affiliate-ties-in-more-states-over-taxes/.

7 Available at http://www.ncsl.org/research/fiscal-policy/state-revenues-downturns-and-recoveries.aspx.

8 Available at http://www.rockinst.org/pdf/government_finance/state_revenue_report/2010-07-13-SRR_80.pdf.

9 Notification and reporting laws require non-collecting retailers to provide annual reports to buyers which notify buyers of potential tax liability. These laws may also require the remote seller report to the state annual data regarding total purchases. Economic nexus laws create a tax obligation for remote retailers that conduct a substantial amount of business activity in the state (e.g., South Dakota's creates a tax obligation for retailers that conduct $100,000 worth of business or 200 separate transactions). Affiliate (related party) nexus laws attribute nexus to a seller based on the physical presence of an affiliate in the state (e.g., a related corporate entity) or the activities of another party in the state, such as a website in the state

States proposed at least one of these types of legislation. *See, e.g.*, Liz Malm, Ryan Maness & Joe Crosby, *Sales Tax Compliance Legislation is Still a Hot Topic at the State (and Federal) Level*, MultiState Insider (May 3, 2017).[10]

While these laws have had varying levels of success, none apart from an economic nexus law of the kind that South Dakota enacted, could effectively captures the rightful share of current taxes due States by online retailers who generate large revenues through their business activity in a particular State. Contrary to the argument posited by many retailers, overturning *Quill* does not lead to the imposition of a new tax. Rather, *Quill* prevents States from effectively collecting a tax that they are already owed. As such, States have realized that the proper path forward in this new digital economy is not a challenge to *Quill* at the margins, but a direct challenge to the physical presence requirement that *Quill* demands. In March 2015, Justice Kennedy echoed this sentiment, writing: "Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. . . . The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Direct Mktg. Ass'n*, 135 S. Ct. 1124, 1134-35 (Kennedy, J., concurring).

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directing sales to a remote seller. See Joe Crosby, Liz Malm & Ryan Maness, South Dakota v. Wayfair: Three Maps, MultiState Insider (Oct. 4, 2017), available at https://www.multistate.us/blog/south-dakota-v-wayfair-three-maps.

10 Available at https://www.multistate.us/blog/sales-tax-compliance-legislation-is-still-a-hot-topic-at-the-state-and-federal-level

South Dakota has answered the call and crafted tailored legislation that addresses *Quill* directly.

II. THIS CASE IS AN OPTIMAL VEHICLE FOR DECIDING WHETHER *QUILL* SHOULD BE OVERRULED.

A. The South Dakota legislation challenges *Quill* and *Bellas Hess* in response to Justice Kennedy's invitation.

About a year after Justice Kennedy invited States to find vehicles for *Quill*'s reconsideration, the South Dakota legislature passed, and the governor signed, Senate Bill 106, "An Act to provide for the collection of sales taxes from certain remote sellers." S.D. Codified Laws § 10-64-1 (2016). The Act, which took effect May 1, 2016, requires out-of-state retailers to collect and remit sales tax, as though they had a physical presence in South Dakota, provided they conduct $100,000 worth of business or 200 separate transactions annually with South Dakota citizens. S.D. Codified Laws § 10-64-2 (2016). It is not retroactive, and applies only to future sales. *Id.*

The Act itself recognizes that the test of "substantial nexus" it imposes does not match the "physical presence" requirement this Court mandated in *Quill* and *Bellas Hess*. The Act accordingly facilitated the creation of this case to create a clean vehicle through which the Court could consider whether the outdated physical presence rule still applies to the modern challenges of Internet retail. The Act's unique structure not only answered Justice Kennedy's call for expedition but also explicitly created a cause of action that facilitated its speedy arrival before this Court.

Notably, South Dakota's initial complaint that ultimately led to this petition for a writ of certiorari began with the following statement: "The State—through this declaratory judgment action—seeks a determination that it may require Defendants to collect and remit state sales tax on sales of tangible personal property and services for delivery into South Dakota. The State acknowledges that a declaration in its favor will require abrogation of the United States Supreme Court's decision in *Quill* . . . and ultimately seeks a decision from the United States Supreme Court to that effect in this case." Compl. at 1-2, *State v. Wayfair, Inc.*, 229 F. Supp. 3d 1026, 1028 (D.S.D. 2017).

The South Dakota law frames the problems created by *Quill* with precision, and indicates that the time for review is now.

B. South Dakota's challenge is in a clean posture, free from any ancillary questions or jurisdictional concerns.

Unlike other cases that have sought certiorari on the issue of *Quill*'s viability, this case cleanly presents the concrete question of whether a particular company with a particular business model can lawfully be required to collect a particular state's sales tax under the dormant Commerce Clause. There are no tangential questions that distract from this primary inquiry.

There are no material issues of fact. The parties have agreed that each seller had a principal place of business outside of South Dakota and each lacked a physical presence in the State. The parties have also agreed that in the previous calendar year, each seller had gross revenue from the sale of tangible personal

property in South Dakota in excess of $100,000 and/or sold tangible personal property in the state in 200 or more separate transactions. Lastly, the parties agreed that none of the sellers were registered to collect South Dakota sales tax. *See State* v. *Wayfair Inc.*, No. 28160, 2017 WL 4051554, at *14 (S.D. Sept. 13, 2017).

There are no ancillary issues. The parties have agreed that the only determinative issue is whether *Quill* retains its force in the modern digital economy. In the state actions below, the State even conceded that summary judgment was appropriate against it on that issue because only this Court has the power to decide the continuing force of *Quill*. The state circuit court and the state supreme court similarly agreed that the only issue on which this case turns is *Quill*'s viability in this brave new world of prolific e-commerce. Notably, South Dakota does not have income tax and, thus, relies on sales tax for its state revenue. This unique feature of the South Dakota case further allows the Court to clearly and fully address the primary *Quill* issue.

There are no jurisdictional issues. South Dakota's initial complaint was filed in state circuit court. The defendant retailers sought to remove the State's action to the United States District Court for South Dakota on the basis of federal question jurisdiction. However, the District Court rejected removal and remanded the case to the South Dakota circuit court in January 2017. The state circuit granted the defendants' motion for summary judgment based on this Court's precedent in *Quill*. The state supreme court followed suit, affirming the circuit court's application of *Quill* based on the facts of this case.

Furthermore, to promote this Court's ability to quickly determine *Quill*s vitality free from any confounding issues and to protect Defendants, who face a difficult compliance decision (if they collect the tax, they have to remit it; if they don't, they may be personally liable for it), the Legislature provided an automatic injunction against enforcement of the Act until completion of any litigation.

Lastly, because this case is free from tangential issues or jurisdictional concerns, this case guarantees adequate adversarial presentation. The sole issue dividing the parties is the applicability of *Quill* in the modern economy. As a result, this important issue would receive the full and undiluted briefing it deserves.

The absence of any other complicating issues and jurisdictional concerns makes this case the ideal candidate to resolve the *Quill* quagmire.

III. UNTIL IT IS OVERTURNED, *QUILL* WILL CONTINUE TO WREAK HAVOC ON STATE AND LOCAL GOVERNMENTS' ABILITY TO COLLECT TAXES THAT ARE ALREADY OWED.

A. Sales and use taxes are a crucial source of revenue for States and local governments.

Sales and use taxes are essential to State and local government revenue streams. "Sales tax" refers to a tax assessed on the sale of a product at the point of sale. It is typically collected and then remitted to the State by the merchant. Because our federal system does not allow a State to impose tax on a sale in which the seller sits in another State, States need an alternate way to capture the tax revenue from sales

made to its residents from out-of-state sellers. Most States have approached this issue by enacting a "use tax"—a tax on consumers of a product or service that is used, consumed, or stored in the taxing State. The two taxes are mutually exclusive: a use tax is not assessed on transactions where a sales tax has already been collected and remitted by the seller to the State. But, to fully capture revenue from sales of products purchased or used in a state, the State must be permitted to impose and collect both sales and use taxes.

Quill mandates that a remote, out-of-state seller must have a physical nexus in a State before the State can require the seller to collect sales or use taxes. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 315-16 (1992). The concrete result of this is that because States cannot rely on collection and remittance from the out-of-state sellers, the burden falls to consumers to report their own out-of-state purchases and to remit the corresponding taxes. This results in a de facto "honor system", where the State's ability to collect owed taxes depends entirely on individuals who are often unaware of this responsibility. As a result, although it sounds reasonable in theory, the use tax is an ineffective alternative in practice because most States are unable to collect the use taxes they are owed.

For most States, sales taxes account for approximately a third of all revenues. *See* National Conference of State Legislatures (NCSL), State Efforts to Collect Remote Sales Taxes (Feb. 2014)

(hereinafter NCSL, State Efforts to Collect).[11] In some States, the reliance is even more profound. South Dakota, for example, depends on the sales tax for over 40 percent of total tax collections. *See* Morgan Scarboro, *To What Extent Does Your State Rely on Sales Taxes*? (Apr. 27, 2017).[12] Washington is the most heavily reliant, relying on sales tax for over 45 percent of total tax collection. *Id.* The States' current inability to collect use taxes from remote sales therefore cuts off a vital source of support for State services related to public safety, infrastructure, education, and other government services. To demonstrate, an NCSL survey of state legislative fiscal officers found that States were forced to endure significant program reductions in order to close a cumulative $527.7 billion budget gap between FY 2008-2013. NCSL, State Efforts to Collect. Effective collection of these owed taxes is imperative for States and local governments to be able to provide fundamental services and benefits demanded by their residents.

B. *Quill* unreasonably hinders the States from collecting owed sales and use taxes.

Sales and use taxes typically range from five to ten percent. *See, e.g.*, Scott Drenkard & Nicole Kaeding, *State and Local Sales Tax Rates in 2016*, Tax Foundation.[13] The two taxes, working in tandem,

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11 Available at http://www.ncsl.org/documents/statefed/MFA_intheStatesFeb2014.pdf.

12 Available at https://taxfoundation.org/sales-taxes-percent-collections/.

13 Available at https://taxfoundation.org/state-and-local-sales-tax-rates-2016/.

would efficiently capture revenue from sales on tangible personal property purchased in a given jurisdiction from both in-state retailers (through the sales tax) and remote retailers (through the use tax).

The practical effect of *Quill* is that States are typically unable to require remote sellers to collect and remit use taxes. This taxation collection inequity leads to a distinct disadvantage for the "brick-and-mortar" stores located within the State. Remote sellers can afford to set their prices lower to account for the fact that the State cannot force them to collect and remit a use tax. Local economies and jobs suffer as a result. In-state merchants, on the other hand, are still required to collect and remit sales tax.

In addition to the unfair marketplace advantage afforded out-of-state retailers under *Quill*, States and local governments also suffer from depressed economic growth. In **Arizona**, for example, a study estimated that the lost impact of e-commerce on the Arizona economy "could grow to as much as 8,679 jobs, $302.5 million in wages, and $841.1 million in economic activity" by 2015. *See* Elliott D. Pollack & Company, Economic and Fiscal Impact of Uncollected Taxes on E-Commerce in Arizona i (2012).[14] Another study found that **Ohio** suffered a revenue shortfall of more than $200 million as a result of sales and use tax non-payment. *See* Economic Analysis of Tax Revenue from E-Commerce in Ohio, Economics Center 1

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14 Available at https://ex.democracydata.com/A160F09F756BBBF1C6606EA72D6BD1EE092B1AB5/35555b34-542c-46ca-b8d6-ce045a849330.pdf.

(2011).[15] The Ohio study further noted that, based on 2011 data, 11,000 direct retail jobs could be recaptured if tax parity were achieved between store retail and online retail. *Id.* In discussing the impact this has on local economies, the study also identified a decrease in commercial rent revenues as a secondary impact of the local stores' loss of revenue; this decrease in commercial rent revenue represented a $120 million decrease in property value. *Id.* The inability to collect owed use taxes thus not only results in a direct revenue loss; it also further impedes States abilities to rely on other sources of revenue because property tax revenue drops when brick-and-mortar stores close due to depressed sales.

Importantly, *Quill* prevents States from effectively collecting a tax that they are already owed. *See No Regulation Without Representation: H.R. 2887 and the Growing Problem of States Regulating Beyond Their Borders Before the H. Comm. On the Judiciary*, 115th Cong. (2017) (statement of Sen. Deb Peters (SD) on behalf of NCSL) ("Remember, this is not a new tax, it is a due tax."). If the out-of-state retailers do not collect and remit use taxes, States are then forced to rely on its residents to voluntarily self-report and pay use taxes on their out-of-state purchases. Unsurprisingly, this scheme does not result in high levels of compliance. Use tax compliance by individual purchasers has been estimated to be somewhere between zero and five percent. *See* U.S. Government Accountability Office, Sales Taxes: Electronic Commerce Growth Presents Challenges;

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15 Available at http://www.efairness.org/pdf/economicscenter-study.pdf.

Revenue Losses Are Uncertain (June 2000).[16] Relying on residents to (1) be aware of and understand how the use tax laws work, (2) track out-of-state purchases, and (3) note any purchases where the retailer did not collect sales tax so that the resident can voluntarily self-report and pay a use tax is an ineffective and unrealistic collection plan. *See, e.g.*, Lila Disque & Helen Hecht, *Beyond* Quill *and Congress: The Necessity of Sales Tax Enforcement and the Invention of a New Approach*, 65 AM. U. L. REV. 1163, 1179-80 (2016) (observing that many in-state consumers are "unaware of the reporting requirement and have failed to keep records of their purchases" and noting efforts made by States to simplify use tax reporting). However, this plan, with its zero to five percent compliance rate, is what States have been forced to accept under *Quill*.

As the amicus brief for the Streamlined Sales Tax Governing Board explains, the majority of states have joined the Streamline Sales and Use Tax Agreement. This agreement has made calculating taxes owed simple—for any seller whether it has an in-state physical presence or not. Among many other things, this agreement provides sellers with a database of tax rates for all jurisdictions levying taxes and relieves sellers from liability if there are errors in the database. So as a practical matter, the Streamline Sales and Use Tax Agreement has abated the undue burden concerns facing out-of-state sellers in all state where it has been adopted. While states have done the hard work of simplifying their tax systems and making collection easy, their work makes little

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[16] Available at http://www.gao.gov/assets/240/230474.pdf.

difference as long as *Quill* remains on the books and out-of-state sellers don't have to collect use tax no matter how easy states have made doing so.

C. The detrimental effect of *Quill* has been, and will continue to be, increasingly exacerbated by the consistent expansion of e-commerce.

Remote sales (largely consisting of orders made over the phone, through the mail, and online) have increased considerably over the past several decades. In the year *Quill* was decided, e-commerce did not even exist; the first legitimate online sales transaction was not completed until 1994. *See* Marissa Fessenden, *What Was the First Thing Sold on the Internet?*, Smithsonian.com (Nov. 30, 2015).[17] Today, online shopping is rampant; about 190 million U.S. consumers were expected to shop online in 2016. Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online* (June 8, 2016).[18]

Over twenty years after *Quill* was decided, Justice Kennedy issued a concurring opinion in *Direct Marketing Association* v. *Brohl* calling the decision "questionable even when decided" and noting that the decision "harms States to a degree far greater than could have been anticipated earlier." 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Justice Kennedy further called for a reevaluation of the Court's holding in *Quill*, observing that "[t]here is a powerful case to be made that a retailer doing

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17 Available at https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/.

18 Available at http://fortune.com/2016/06/08/online-shopping-increases/.

extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet." *Id.* As Justice Kennedy predicted, the strength of this argument has increased with time, as the prevalence of remote sales has continued to increase. Similarly, then-Judge Gorsuch noted in his concurrence on remand to the Tenth Circuit that "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Direct Mktg. Ass'n* v. *Brohl*, 814 at 1151 (Gorsuch, J., concurring). The drastic expansion of e-commerce over the past two decades has indicated that *Bellas Hess* and *Quill* will not wash away on their own; their damaging effects will continue to harm States until they are overturned.

The expansion of e-commerce has shown no signs of slowing down over the course of 2017. The Census Bureau of the Department of Commerce reported that an estimated $111.5 billion in U.S. retail e-commerce sales were conducted in the second quarter of 2017. *Quarterly Retail E-Commerce Sales: 2nd Quarter 2017*, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Aug. 17, 2017, at 1.[19] This accounted for 8.2 percent of total sales, and it represented a 4.8 percent increase in e-commerce sales from the first quarter of 2017. During this time period, total retail sales increased by only 0.5 percent. Further, the $111.5 billion in second quarter e-

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[19] Available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

commerce sales represented a substantial 16.2 percent increase from the second quarter of 2016, compared to a 4.1 percent increase in total retail sales over the same period.[20] E-commerce sales are not only rapidly expanding; they are expanding at almost four-times the rate of total retail sales. It is estimated that they will account for 17 percent of total U.S. retail sales within the next five years. *See* Matt Lindner, *E-Commerce is Expected to Grow to 17% of US Retail Sales by 2022* (Aug. 9, 2017).[21]

The effect of the States' inability to collect taxes that are owed on these sales is impossible to overstate. In 2015, for example, uncollected U.S. sales and use taxes from remote sales were estimated to be almost $26 billion. Of this $26 billion, over $17 billion uncollected taxes were projected to be from electronic sales. National Conference of State Legis-latures (NCSL) & International Council of Shopping Centers (ICSC), Uncollected Sales & Use Tax from Remote Sales: Revised Figures.[22]

The fundamental problem that *Quill* and *Bellas Hess* imposes on the States remains the same: States are unable to collect owed taxes, and their revenue streams suffer as a result. As Justice Kennedy has

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20 Quarterly Retail E-Commerce Sales: 2nd Quarter 2017, U.S. Census Bureau News (U.S. Dep't of Commerce, Washington, D.C.), Aug. 17, 2017, at 1 (available at https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf). The estimated $111.5 billion in U.S. retail e-commerce sales was adjusted for seasonal variation, but it was not adjusted for price changes.

21 Available at https://www.digitalcommerce360.com/2017/08/09/e-commerce-grow-17-us-retail-sales-2022/.

22 Available at March 2017), http://www.efairness.org/files/Updated%20Sales%20Tax%20Loss%20Report.pdf.

highlighted, the cause grows "more urgent" with time. *Brohl*, 135 S. Ct. at 1135 (Kennedy, J., concurring). The detrimental effects will continue to grow alongside the growth of e-commerce.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

The National Governors Association (NGA), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the 50 states, three territories, and two commonwealths.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and its territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases raising issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities (NLC) is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The US Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance through advocacy and by developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professsionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National School Boards Association (NSBA) represents state associations of school boards across the country and their more than 90,000 local school board members. NSBA's mission is to promote equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and in federal and state courts, and frequently in cases involving the impact of federal employment laws on public school districts.

AASA, the School Superintendents Association, advocates for the highest quality public education for all students, and develops and supports school system leaders. Founded in 1865, AASA is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders.

The National Association of Elementary School Principals (NAESP), founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the

United States, Canada, and overseas. NAESP advocates for the support principals need to be successful 21st century leaders—to achieve the highest results for children, families, and communities. And, we support the continual development of our members—principals in many different stages of their careers—through benefits, and awards. All of our activities are designed to help principals and learning communities achieve desired results for every child. The mission of the National Association of Elementary School Principals (NAESP) is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment for all children.